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8 GREGORY R. HOLMES
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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES
12

13
14 TODD MICHAEL SCHULTZ

15 Plaintiff
16

17 v.
18

19 MICHAEL C. THOMPSON, GREGORY
20 R. HOLMES, and YOUTUBE LLC

21 Defendants.
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Case No. 2:23-CV-03452-JAK-
MRWx

Hon. John A. Kronstadt

**EX PARTE APPLICATION OF
DEFENDANT GREGORY R.
HOLMES FOR
CONFIRMATION OF DATE TO
FILE RESPONSE TO
OPERATIVE COMPLAINT;
MEMORANDUM OF POINTS
AND AUTHORITIES;
DECLARATION OF MARK D.
HURWITZ**

[No hearing unless ordered]

1 Defendant Gregory R. Holmes (“Holmes”) hereby applies ex parte to this
2 Court for an order confirming that Holmes has until August 7, 2023 respond to the
3 operative complaint of Plaintiff Todd Michael Schultz (“Plaintiff”) in this matter,
4 which now appears to be the Fourth Amended Complaint filed on July 17, 2023.

5 This application is based upon the following grounds:

6 1. Counsel for Holmes in this matter was not engaged until July 18,
7 2023, as Holmes is a resident of the Commonwealth of Kentucky and until now did
8 not have California counsel.

9 2. Holmes contemplates filing a motion under Rules 12(b), 12(e) and/or
10 12(f) of the Federal Rules of Civil Procedure and understands that in order to do
11 so, pursuant to Local Rule 7-3 of this Court, his counsel must meet and confer with
12 Plaintiff at least seven days before filing such a motion.

13 3. Upon checking the docket in this matter, Holmes’ counsel saw an
14 entry indicating that Holmes’ response was purportedly due on July 21, 2023, but
15 the docket also shows that on July 17, 2023, Plaintiff filed a Fourth Amended
16 Complaint that has not yet been served on Holmes.

17 4. Plaintiff orally agreed that, in light of the Fourth Amended Complaint,
18 Holmes may have until August 7, 2023 to respond thereto.

19 This application is based upon the attached Memorandum of Points and
20 Authorities and Declaration of Mark D. Hurwitz, the papers and pleadings on file
21 with the Court in this action, and such other and further matters as the Court may
22 consider.

23 Holmes is informed and believes that Plaintiff is representing himself and
24 that his name, address, telephone number and email address are:

1 Todd Michael Schultz
2 818 N. Doheny Drive, # 1108
3 West Hollywood, CA 90069
4 (310) 435-5847
5 ToddSchultz86@gmail.com.
6

7 Plaintiff stated orally, during a telephone conference with Holmes' counsel
8 on July 21, 2023, that he does not oppose this application to confirm that Holmes
9 has until August 7, 2023 to respond to the Fourth Amended Complaint.
10

11 DATED: July 21, 2023

LEVY, SMALL & LALLAS
A Partnership Including Professional
Corporations
TOM LALLAS
MARK D. HURWITZ

15 By: Mark Hurwitz
16 MARK D. HURWITZ
17 Attorneys for Defendant
Gregory R. Holmes
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MEMORANDUM OF POINTS AND AUTHORITIES

Holmes hereby applies ex parte pursuant to Local Rule 7-19 to confirm the date by which he must respond to Plaintiff's operative complaint in this matter. When given oral notice that this application would be filed, Plaintiff agreed that Holmes has until August 7, 2023 to file his response to the operative complaint.

Holmes, who is a resident of the Commonwealth of Kentucky, did not have California counsel when he purportedly was served with a Summons and Third Amended Complaint in this matter. Holmes engaged the undersigned counsel on July 18, 2023. Upon reviewing the docket in this matter, counsel noted an entry indicating that Holmes' response was due on July 21, 2023 [Docket No. 30], but also noted that a Fourth Amended Complaint was filed on July 17, 2023 [Docket No. 42]. The Fourth Amended Complaint has not yet been served on Holmes (although Plaintiff may contend that it has been). Pursuant to Rule 15(a)(3) of the Federal Rule of Civil Procedure ("FRCP"), "Unless the Court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." Accordingly, Holmes is entitled to at least fourteen (14) days after service of the Fourth Amended Complaint to respond thereto, and no default may be entered against him in the meantime.

The additional time afforded by FRCP Rule 15(a)(3) is appropriate in any event because Holmes may respond to the operative complaint by filing a motion under FRCP Rules 12(b), 12(e) and/or 12(f), and Holmes understands that pursuant to Local Rule 7-3 of this Court, counsel must meet and confer with Plaintiff at least seven days before filing such a motion. Since counsel was first engaged on July 18, 2023, there was no time to meet and confer under Local Rule 7-3 before July 21, 2023.

In any event, Holmes should not have to respond to the Third Amended Complaint, let alone any complaint prior thereto. As the Ninth Circuit Court of

1 Appeals stated in *Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th
2 Cir. 2015): “It is well-established in our circuit that an ‘amended complaint
3 supersedes the original, the latter being treated thereafter as non-existent.’ ...
4 Consequently, the Plaintiff’s Second Amended Complaint superseded the First
5 Amended Complaint, and the First Amended Complaint ceased to exist.”
6 [Citations omitted.] There is no reason for Holmes to have to respond to a non-
7 existent prior complaint.

8 For the foregoing reasons, Holmes respectfully requests that the Court grant
9 this application and issue an order in the form submitted herewith.

10 DATED: July 21, 2023

11 LEVY, SMALL & LALLAS
12 A Partnership Including Professional
13 Corporations
14 TOM LALLAS
15 MARK D. HURWITZ

16 By: Mark Hurwitz
17 MARK D. HURWITZ
18 Attorneys for Defendant
19 Gregory R. Holmes
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DECLARATION OF MARK D. HURWITZ

I, Mark D. Hurwitz, declare as follows:

1. I am an attorney at law duly admitted to practice before this Court and all courts of the State of California and am an attorney at Levy, Small & Lallas, A Partnership Including Professional Corporations (“LSL”), attorneys of record for Defendant Gregory R. Holmes (“Holmes”) in the above-captioned matter. I have personal, first-hand knowledge of the entire contents of this Declaration and, if called upon to do so, could and would competently testify thereto.

2. On July 21 2023 at approximately 11:10 a.m., I spoke by telephone call with Plaintiff Todd Michael Schultz (“Plaintiff”) and informed him of the accompanying ex parte application. Plaintiff told me that since he filed a Fourth Amended Complaint, Holmes has additional time to respond, and to resolve any ambiguity over the response date, Plaintiff agreed that Holmes has until August 7, 2023 to respond to the Fourth Amended Complaint.

3. LSL was first engaged, and I first became aware that LSL would represent Holmes in this matter, on July 18, 2023. After LSL was engaged, I reviewed the docket in this case and found that, among other things, (a) Docket No. 30 states that Holmes was purportedly served on June 30, 2023 with the Summons in this action and that his response was due on July 21, 2023, and (b) on July 17, 2023, Plaintiff filed a Fourth Amended Complaint in this action.

4. As of July 21, 2023 at 8:30 a.m., the Fourth Amended Complaint has not been served on Holmes. Although Plaintiff told me he believes he has served Holmes with the Fourth Amended Complaint and that he did not need to serve it in the same manner as a summons, Plaintiff’s agreement to the August 7, 2023 response date moots this issue for purposes of this application.

5. Holmes is a resident of the Commonwealth of Kentucky and did not have any attorney to represent him in California until LSL was engaged on July 18, 2023.

PROOF OF SERVICE

Todd Michael Schultz vs. Michael C. Thompson, et al.

U.S. District Court – Central District, Case No. 2:23-CV-03452-JAK-MRWx

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 815 Moraga Drive, Los Angeles, California 90049.

On July 21, 2023, I served the foregoing document described as: **EX PARTE APPLICATION OF DEFENDANT GREGORY R. HOLMES FOR CLARIFICATION OF DATE TO FILE RESPONSE TO OPERATIVE COMPLAINT** on all interested parties in this action ☒ by placing a true copy ☐ by placing true copies thereof enclosed in sealed envelopes addressed as shown on the below service/mailling list in the manner indicated below:

☒ **(BY SERVICE OF COURT VIA NOTICE OF ELECTRONIC FILING (“NEF”))** Pursuant to controlling General Order(s), the foregoing document will be served by the Court via NEF and hyperlink to the document. I checked the CM/ECF docket for this action and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addresses indicated below.

- **Todd Michael Schultz**
818 N. Doheny Drive, #1108
West Hollywood, CA 90069
toddshultz86@gmail.com

☒ **(FEDERAL)** I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 21, 2023, at Los Angeles, California.

/s/Mark D. Hurwitz
Mark D. Hurwitz